STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2013
v	No. 312556 Livingston Circuit Court
ROBERT CLINTON GIAMPORCARO, Defendant-Appellant.	LC No. 12-020392-FH

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of domestic violence, MCL 750.81(3); two counts of interference with electronic communication, MCL 750.540(5)(a); and three counts of assault with a deadly weapon (felonious assault), MCL 750.82. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to jail terms of one year for each domestic violence conviction and to prison terms of 58 months to 15 years for each of the remaining convictions. We affirm.

Defendant and a woman (hereinafter referred to as "the victim") had been dating for about five years and defendant lived with her on and off over that time. On December 26, 2011, defendant and the victim were having an argument. The victim tried to leave the house but defendant stopped her by picking her up and throwing her backwards across a table. Over the course of the evening, defendant punched the victim in the face three to four times. The victim testified that when she attempted to call 911 with the landline telephone and her cellular telephone, defendant intervened and broke both telephones.

The victim's son tried to distract defendant from the victim, but defendant picked the son up by the throat and threw him into the dining area. At some point, defendant picked up a counter stool and stood over the victim swinging it at her. Defendant also had a knife at one point and told the victim and her son, "tonight we all die." The victim suffered serious facial injuries.

Defendant first argues that the trial court erred in denying his motion for a directed verdict concerning the three charges of felonious assault and the two charges of interfering with electronic communication. He also asserts that the convictions violated due-process protections because they were based on insufficient evidence.[1] We disagree.

We review de novo a trial court's decision concerning a motion for a directed verdict. *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010). This Court reviews the evidence "in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt." *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008). Circumstantial evidence and the reasonable inferences that can be drawn from that evidence can amount to sufficient evidence supporting a conviction. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The trial court may not grant a directed verdict if it requires a determination of witness credibility. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Indeed, the jury is responsible for determining questions of credibility and intent. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Furthermore, what inferences can be drawn from the evidence and the weight to be given to those inferences are questions left to the jury. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

To establish felonious assault, the prosecutor must prove that the defendant committed "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013) (internal quotation marks and citation omitted). An assault is committed when the defendant "attempt[s] to commit a battery or [commits] an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Moreover, MCL 750.540(4) provides that "[a] person shall not willfully and maliciously prevent, obstruct, or delay by any means the sending, conveyance, or delivery of any authorized communication, by or through any . . . telephone line . . . ."

The victim testified that she was on the floor when defendant picked up one of the counter stools and began swinging it at her. She said that she thought defendant was going to hit her with it and that she was afraid for her life. The victim's son also said that he saw defendant standing over the victim with the stool and that it looked like defendant was swinging the stool at the victim. Moreover, he testified that at one point when he was attempting to comfort the

[1] Defendant also mentions equal protection in his question presented for appeal. However, he does not develop this argument. "A party cannot leave it to this Court to "'discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). "Issues insufficiently briefed are deemed abandoned on appeal." *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002).

victim, defendant grabbed a knife, stood in front of them, and threatened them by saying, "tonight we all die." The victim testified that she recalled defendant saying he was going to kill her and her son. The son said he was scared and felt threatened.

The prosecutor presented sufficient evidence to establish that defendant committed three counts of felonious assault during his serious attack: one with the chair against the victim, one with a knife against the victim, and one with a knife against the son. Based on the testimony, it was reasonable for the jury to infer that both the victim and her son were afraid of an immediate battery and that defendant committed an assault on both. *Starks*, 473 Mich at 234. The prosecutor also presented sufficient evidence to establish that defendant used dangerous weapons—the chair and knife. The knife was a dangerous weapon according to the pertinent statute. MCL 750.82(1). Also, the manner in which defendant was swinging the stool at the victim was violent, and therefore the stool could be reasonably construed as a dangerous weapon. See *People v Kay*, 121 Mich App 438, 444; 328 NW2d 424 (1982) ("the manner in which the instrumentality is used and the nature of the act [sic] determines whether the instrumentality is dangerous"). Lastly, the jury was permitted to make reasonable inferences and, based on the testimony and defendant's actions, it was reasonable to infer that defendant intended to place both the victim and her son in fear of an immediate battery. When viewing the evidence in the light most favorable to the prosecution, we find that the prosecution met its burden of presenting sufficient evidence to establish the essential elements of three counts of felonious assault. Therefore, the trial court did not err in denying defendant's motion with regard to the felonious assault charges, and there was no due-process violation.

Defendant also argues that the trial court erred in denying his directed-verdict motion with regard to the charges of interfering with electronic communication. Defendant argues that because there was some conflicting testimony between the victim and her son about whether the telephones were being used when defendant broke them, there was insufficient evidence to support the convictions. However, the trial court may not grant a directed verdict if it requires a determination of witness credibility. *Mehall*, 454 Mich at 6. A conflict in testimony presents a question of credibility regarding which witness is telling the truth or testifying accurately, and credibility is a jury determination. *Harrison*, 283 Mich App at 378.

The victim said she was attempting to call 911 on the landline telephone when defendant took the phone and threw it on the floor, where the phone broke. She said she then attempted to call 911 on her cellular telephone and defendant again took the telephone and broke it. As noted, MCL 750.540(4) provides that "[a] person shall not willfully and maliciously prevent, obstruct, or delay by any means the sending, conveyance, or delivery of any authorized communication, by or through any . . . telephone line . . . ." The victim's testimony established that she was attempting to make calls when defendant interfered and broke two telephones.

The son also testified that he saw defendant take the victim's cellular telephone and break it. The son testified that when defendant took the cellular telephone he said, "No one's calling the police." The son also testified that when defendant broke the landline telephone, no one was trying to use it. Any conflict in testimony between the victim and her son presented a credibility determination within the province of the jury. The prosecution presented sufficient evidence to establish that defendant broke the landline and cellular telephones to prevent the victim from

contacting the police. The trial court did not err in denying defendant's directed-verdict motion concerning the counts of interfering with electronic communication because there were credibility questions for the jury. *Mehall*, 454 Mich at 6. Coextensively, there was no due-process violation.

Next, defendant argues that the trial court violated his federal constitutional rights by failing to consider mitigating circumstances before imposing his prison sentences. Defendant argues that his concurrent sentences of 58 months to 15 years were disproportionate and that resentencing is required. Further, defendant argues that the trial court erred in giving defendant no credit for time served. Alternatively, defendant argues that defense counsel was ineffective for failing to object at sentencing to the allegedly disproportionate sentence and the lack of credit for time served.

A sentence that falls within the guidelines is presumptively proportionate. *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011). Even assuming that this issue has been fully preserved, if a defendant's sentence is within the appropriate guidelines, this Court will only remand for resentencing if there was either "an error in scoring or defendant's sentence was based on inaccurate information." *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010).

Defendant's sentencing guidelines were 14 to 58 months and the trial court sentenced him to 58 months to 15 years. There were issues with the scoring of offense variables (OVs) 1 and 2; these changed defendant's scoring but did not change his guidelines. Therefore, even considering trial counsel's argument below against increasing the score of OV 1, the guidelines did not change. Cf. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). Defendant's sentences fell within the appropriate guidelines.

Further, defendant has failed to demonstrate that the sentence was based on inaccurate information. During sentencing, counsel requested various corrections to the presentence investigation report, which the trial court allowed. The trial court also asked defendant if he had gone over the report and if there were additions, corrections, or deletions other than those counsel had addressed. Defendant indicated that there were no other additions or corrections he believed were necessary. On appeal, defendant has failed to indicate how the scoring was based on inaccurate information. Instead, defendant focuses on the proportionality of the sentence and argues that defendant's strong family support, remorse, substance-abuse problems, and alleged mental-health problems required a lesser sentence. However, as noted, a sentence that falls within the guidelines is presumptively proportionate, *Armisted*, 295 Mich App at 51, and defendant has not articulated how these factors would have changed the information on which the scoring was based. Presumably, the trial court understood all controlling legal principles, see, generally, *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002), and understood that it could sentence within the range of the guidelines or even below the guidelines if substantial and compelling reasons existed for doing so, see MCL 769.34(3). Even assuming a challenge to proportionality is proper, see *Armisted*, 295 Mich App at 52 n 4, we find, in light of all the circumstances, that defendant has failed to establish a basis for relief or a related basis for claiming ineffective assistance of counsel.

Defendant also asserts that the length of his 58-month minimum sentence shows that he was punished for exercising his right to go to trial. A trial court may not punish a defendant for exercising his right to a trial. *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011). "However, it is not per se unconstitutional for a defendant to receive a higher sentence following a jury trial than he would have received had he pleaded guilty." *Id.* A defendant faces some risks by going to trial, one of which is that the sentence following trial may be higher than that offered in a plea agreement. *Id*. There is nothing in this record other than the lengthier sentence itself to support the assertion that it was intended as punishment for exercising the right to a trial.

Defendant also argues the trial court erred in not giving defendant credit for time served. Michigan's jail-credit statute, MCL 769.11b, provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

However, a defendant is not entitled to jail credit automatically; if the defendant is a parolee, no jail credit is appropriate when "the parolee continues to serve out any unexpired portion of his earlier sentence . . . until discharged by the Parole Board." *People v Idziak*, 484 Mich 549, 562; 773 NW2d 616 (2009). The *Idziak* Court reasoned that a parolee is not entitled to credit because the parolee is serving a prior sentence, not because he is unable to furnish bond for the new crime. *Id*. at 562-563.

Defendant argues that he was entitled to jail credit on his misdemeanor crimes and asserts that *Idziak* applies only to felonies. Defendant's position is meritless. Defendant was on parole at the time he committed the current crimes. Therefore, when defendant went back to prison he continued to serve time on his prior sentence and any time earned was credited to his prior sentence. Therefore, regardless of whether the current crimes were misdemeanors or felonies, defendant's time served was for a prior sentence and not because he could not furnish bond for the new crimes. *Id*. The trial court did not err in denying defendant credit for jail time served at the time of sentencing, and there was no ineffective assistance of counsel because counsel is not ineffective for failing to advance a meritless position or make a futile motion. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

Finally, defendant argues that the trial court erred in admitting evidence of other acts of domestic violence under MCL 768.27b because the other acts were unfairly prejudicial in violation of MRE 403.[2] Further, defendant argues that MCL 768.27b does not permit other acts to be used to establish propensity. We disagree.

[2] Defendant asserts in a conclusory manner that the MRE 403 error gives rise to due-process and equal-protection claims. He has abandoned these arguments by failing to develop them. See *Kevorkian*, 248 Mich App at 389; *Van Tubbergen*, 249 Mich App at 365.

This Court reviews a trial court's decision whether to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion occurs when the decision falls beyond the range of principled results. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). However, whether evidence is admissible under a statute may involve a question of statutory interpretation that is reviewed de novo. See *People v Smith*, 282 Mich App 191, 198; 772 NW2d 428 (2009), and *McDaniel*, 469 Mich at 412.

MCL 768.27b(1), in pertinent part, provides that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if not otherwise excluded under Michigan rule of evidence 403." MCL 768.27b(4) prohibits the admission of acts occurring more than 10 years before the charged offense, unless the trial court determines that the interests of justice require its admission. The purpose of allowing evidence of prior domestic-violence acts is to give a complete picture of a defendant's history, which will "shed light on the likelihood that a given crime was committed." *People v Cameron*, 291 Mich App 599, 610; 806 NW2d 371 (2011) (internal quotation marks and citation omitted).

MRE 403 provides that relevant evidence can "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Because all evidence tends to be prejudicial to the opposing party, only evidence that is unfairly prejudicial will be excluded. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Evidence tends to be unfairly prejudicial when it is marginally probative and there is a danger that it will be given undue weight by the jury. *Id.*

In this case, the other-acts evidence involved two previous acts of domestic violence. The victim testified that in October 2007 defendant committed domestic violence when he grabbed her by the neck and pushed her against a wall. She said that during that incident defendant also broke the landline telephone. The other incident was in November 2007, when defendant got angry with and hit the son. When the trial court determined that the evidence was admissible, the trial court did not conduct an MRE 403 balancing test. Instead, the trial court relied exclusively on MCL 768.27b to support admission of the evidence. Although the trial court has discretion to admit evidence, the statute and caselaw clearly indicate that the evidence is admissible only if it does not violate MRE 403. MCL 768.27b(1); *Cameron*, 291 Mich App at 610. Therefore, the trial court erred in failing to conduct the proper inquiry into whether any prejudicial effect outweighed the probative value.

However, any error the trial court committed was harmless. See, e.g., MCL 769.26, which states:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court,

> after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

The evidence was relevant because of the similarity in the nature of the acts. The similarity between the incidents and the fact that the incidents involved the same parties made the evidence highly probative. As noted, the purpose of MCL 768.27b is to give a complete picture of a defendant's history, which will "shed light on the likelihood that a given crime was committed." *Cameron*, 291 Mich App at 610 (internal quotation marks and citation omitted).

Defendant argues that the evidence was highly prejudicial but does not indicate what prejudice resulted. The evidence did not mislead the jury, confuse any issues, waste time, or delay the proceeding; nor was it cumulative. MRE 403. Defendant has failed to indicate the prejudice he suffered from the admission of the evidence other than stating that it tended to demonstrate propensity. The evidence was highly probative and this Court and the statute allow the evidence, even if it shows propensity. *Cameron*, 291 Mich App at 610, 612. We find no miscarriage of justice and no basis for reversal.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan